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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY BOWDEN, Defendant and Appellant.	D074356 (Super. Ct. No. SCD277149)

APPEAL from a judgment of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Affirmed.

Laura R. Sheppard, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steven T. Oetting and Kristen A. Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Jeffrey Bowden pled guilty to one count of robbery and admitted that he used a deadly weapon in committing the offense. The trial court placed Bowden on formal probation for three years, and, as a condition of probation, imposed a Fourth Amendment waiver that included the requirement that Bowden submit his "computers, and recordable media including electronic devices to search at any time." (Underscore omitted.)

Bowden appeals, contending that the probation condition requiring him to submit his computers and electronic devices to warrantless searches is unreasonable and is unconstitutionally overbroad.[1] We conclude that given the circumstances of the offense and the context of Bowden's commission of the offense, the challenged condition is reasonable under the authority of *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and is not constitutionally overbroad as applied to Bowden. We therefore affirm the judgment of the trial court.

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1 The Supreme Court has granted review in several cases that address the reasonableness and constitutionality of electronic search conditions. (See, e.g., *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*), review granted November 29, 2017, S244650; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted December 14, 2016, S238210.)

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*[2]

On June 6, 2018, a loss prevention officer was notified by a Kohl's store employee that Bowden had concealed four shirts behind this back. The loss prevention officer watched Bowden proceed to take the shirts out of the store without paying for them. The loss prevention officer identified himself to Bowden, who then brandished a box cutter and said to the loss prevention officer, " 'Homie, get away.' "

Bowden admitted the following regarding the offense: "I took the property of another by force or fear with the intent to permanently deprive them of the property. I personally used a dangerous weapon in commission of the felony."

After Bowden was arrested, officers found additional new merchandise in his backpack, including a pair of Nike shoes, a video camera, and a pair of pants, all of which appeared to have been taken from a Marshall's store.

According to the probation report, Bowden admitted that he had "been using 'meth and heroin' for the last 1.5 years and became physically addicted to the narcotics." Bowden indicated that he "decided he needed to shoplift in order to sell whatever he stole to purchase drugs." The probation report indicates that Bowden's criminal history dates back to 1995 and includes a number of violent assaults, drug offenses, theft, and domestic abuse offenses. Bowden was placed on probation in 1997, but he violated the conditions

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2 Some of the facts of the offense are taken from the probation report.

of probation and was sentenced to five years in prison. He was again placed on probation in 2011 in connection with a drug offense, and was arrested for a violent assault committed while he was on probation. Since moving to San Diego, Bowden had been arrested "at least 10 times," and was on probation at the time he was arrested for the current offense. The probation department considered his performance on probation to be "poor."

B. *Procedural background*

The San Diego County District Attorney charged Bowden with one count of robbery (Pen. Code,[3] § 211), and alleged that Bowden had used a deadly weapon in committing the offense (§ 12022, subd. (b)(1)). The complaint also alleged that Bowden had suffered seven probation denial priors within the meaning of section 1203, subdivision (e)(4).

Bowden pled guilty to the charged offense and admitted that he had used a deadly weapon in committing the offense.

The trial court placed Bowden on probation and set a number of terms and conditions. Included in the terms and conditions of probation is condition 6.n, which requires Bowden to submit his "computers[ ] and recordable media including electronic devices to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. or law enforcement officer." Bowden's defense counsel objected to the imposition of this condition.

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3 Further statutory references are to the Penal Code unless otherwise indicated.

Bowden filed a timely notice of appeal from the order granting him formal probation.

III.

DISCUSSION

Bowden challenges the imposition of that portion of the search condition set forth as condition 6.n that requires that he submit his computers and electronic devices to search at any time (the electronic search condition). Bowden contends that the electronic search condition is an invalid condition of probation under the standards set forth in *Lent*, *supra*, 15 Cal.3d 481, and further maintains that the condition is constitutionally overbroad as applied to him.

A. *Additional procedural background*

At sentencing, defense counsel objected to the imposition of a search condition pertaining to Bowden's electronic devices under *Lent* and also on the ground that the condition was unconstitutionally overbroad, stating:

> "As to [probation condition] 6N, your Honor, I would object as to computer-recorded media, including electronic devices, that specific section. I'm going to ask -- pursuant to *People* [*v.*] *Lent*, I don't believe that there's a nexus. This is a robbery that involved, I believe, a box cutter. There's no electronic devices used in the case, and I don't believe there's a nexus to the conduct. It is legal conduct. And, then, I would just also cite *In Re: Sheena K.* That's at 40 Cal.4th 875. And it's just talking about probation conditions that impose limitations on a person's Constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad, and that is what I think it is in this case."

The prosecutor responded to defense counsel's objection, arguing as follows:

> "Your Honor, with respect to condition 6N, [the] People believe there is a nexus even under the higher standard articulated in *Lent*. In this case, the defendant committed the robbery in the course of what would have otherwise been a shoplift. One of the items he took was a video camera, which is the type of item that one generally needs to view video from. Because the defendant was stealing property, people who steal property sell it on the Internet, and use the Internet or computers to be able to profit off of it. The defendant has a drug history going back, and so I believe that fourth waiver condition for computers and electronic media is required to make sure the defendant does not continue to steal or profit off his theft or use drugs, in order to enable probation supervision."

With respect to the electronic search condition, the court stated:

> "[A]s indicated in 6N, I think there is a nexus, based on what the D.A. had said; as well as on page 4, it said that he had been using meth and heroin for the last one-and-a-half years, became addicted. When he woke up on the morning of the offense, he was coming down and decided he needed to shoplift to sell whatever he stole to purchase drugs. So I think there is very much of a nexus with that. So I'm going to impose 6N, as indicated, including electronic devices."

B. *The search condition is not unreasonable under* Lent

Bowden contends that the electronic search condition is unreasonable under the standards for invalidity of a probation condition set forth in *Lent, supra*, 15 Cal.3d 481.

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' (§ 1203.1, subd. (j).) Accordingly, [our Supreme Court has] recognized a sentencing court has 'broad

discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to . . . section 1203.1.' [Citation.] But such discretion is not unlimited: '[A] condition of probation must serve a purpose specified in the statute,' and conditions regulating noncriminal conduct must be ' "reasonably related to the crime of which the defendant was convicted or to future criminality." ' [Citation.] 'If the defendant finds the conditions of probation more onerous than the sentence he would otherwise face, he may refuse probation' [citation] and simply 'choose to serve the sentence' [citation]." (*People v. Moran* (2016) 1 Cal.5th 398, 402–403 (*Moran*).)

Thus, " '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*People v. Olguin* (2008) 45 Cal.4th 375, 379–380 (*Olguin*); see *Lent*, *supra,* 15 Cal.3d at p. 486.)

After *Lent*, the California Supreme Court clarified that a probation condition "that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality.' " (*Olguin*, *supra,* 45 Cal.4th at pp. 380–381.) Because the probation officer is responsible for ensuring that a probationer refrains from criminal

activity and obeys all laws during the probationary period, the court may impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. (*Id.* at pp. 380–381; *People v. Balestra* (1999) 76 Cal.App.4th 57, 67 ["a warrantless search condition is intended to ensure that the [probationer] is obeying the fundamental condition of all grants of probation, that is, the usual requirement . . . that a probationer 'obey all laws' "].)

On appeal, we review a challenge to the reasonableness of a probation condition for an abuse of discretion. (*Olguin, supra,* 45 Cal.4th at p. 379.) "[A] reviewing court will disturb the trial court's decision to impose a particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable." (*Moran, supra,* 1 Cal.5th 398 at p. 403.)

The trial court concluded that there was a sufficient nexus between Bowden's offense—i.e., the violent taking of property from a store—and the challenged probation condition, noting that Bowden's purpose in stealing the property was to sell it in order to procure drugs. As the court further acknowledged in agreeing with the prosecutor's argument on this point, it is often the case that individuals who steal items sell those items using the internet. Thus, although Bowden did not utilize an electronic device in committing the offense of which he was convicted, there is a sufficient nexus between the offense and the use of an electronic device to warrant application of the electronic search condition. As the trial court noted, Bowden's purpose in committing the offense was not simply to commit a robbery to obtain new items for himself, but rather, to obtain property

of value that he could sell to get money to buy drugs.[4] In order to complete the plan, Bowden would have had to sell the property, possibly by using the Internet to do so. This constitutes a sufficient relationship between the offense for which Bowden was convicted and the condition requiring Bowden to submit to the search of his electronic devices. The condition therefore does not meet the first *Lent* prong, as would be required to invalidate the challenged condition.

In addition, given this link between the type of offense at issue and Bowden's reason for committing it (i.e., to obtain cash in order to procure drugs) and the potential use of an electronic device to complete the criminal goal, it is also clear that the probation condition is reasonably related to preventing Bowden's future criminality. "The primary focus of *Lent*'s third-prong jurisprudence has been on the particular facts and circumstances of the case before the court, rather than on establishing bright-line rules. [Citations.] This makes sense given that the appropriateness of a particular probation condition necessarily depends on a myriad of tangible and intangible factors before the trial court, including the defendant's particular crime, criminal background, and future prospects. It is for the trial court, with the assistance of the probation officer and other experts, to determine the probation conditions that will permit effective supervision of the probationer." (*Trujillo*, *supra*, 15 Cal.App.5th at p. 584, review granted.)

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4 Bowden admitted to the probation department that with respect to the offense, he had been using " 'meth and heroin' " and was addicted to the drugs. He was " 'broke' " and " 'coming down' " from the drugs, and "therefore decided he needed to shoplift in order to sell whatever he stole to purchase drugs."

Bowden has a history of numerous prior convictions, including offenses such as driving under the influence, theft, possession of drugs and drug paraphernalia, and violent assault. His performance on probation in the past, both in 1997 and in 2011, was poor. Bowden has also admitted to having a drug addiction and to using drugs on a daily basis. Under these circumstances, it was reasonable for the trial court to conclude that a probation officer would be much more effective in supervising Bowden if that officer could monitor his electronic device usage to ensure that Bowden is not using an electronic device to sell stolen property or to obtain drugs. The trial court could also fairly conclude that the electronic search condition is reasonably related to discouraging Bowden's future involvement in criminal behavior. (See *Trujillo*, *supra*, 15 Cal.App.5th at p. 583 [defendant's significant untreated alcohol abuse supported need for intensive probation monitoring]; see also *In re J.E.* (2016) 1 Cal.App.5th 795, 801, review granted October 12, 2016, S236628 [minor's need for intensive monitoring, including for compliance with various drug-related probation conditions, justified imposition of electronic search condition].) We therefore conclude that the electronic search condition imposed in this case is valid under *Lent*.

C. *Facial Constitutional Challenge*

Bowden contends that the electronics search condition is constitutionally overbroad as applied to him, given the United States Supreme Court's decision in *Riley v. California* (2014) 573 U.S. 373 (*Riley*). Bowden relies on *People v. Appleton* (2016) 245 Cal.App.4th 717, 727, which in turn relied on *Riley* to strike "as overbroad an 'electronic search condition' identical to the condition imposed on Bowden."

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) "A restriction is unconstitutionally overbroad . . . if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' " (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

" 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*People v. Forrest* (2015) 237 Cal.App.4th 1074, 1080.) This is because "[i]nherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' " (*United States v. Knights* (2001) 534 U.S. 112, 119.) We review constitutional challenges to probation conditions de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

The United States Supreme Court has recognized that the data stored on a cell phone is both quantitatively and qualitatively different from records typically stored in one's home. In *Riley*, the Court observed that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—

unless the phone is." (*Riley, supra*, 573 U.S. at pp. 396–397.) The *Riley* Court explained,

> "Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building . . . . [¶] Mobile application software on a cell phone, or 'apps,' offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. . . . The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life." (*Id.* at p. 395.)

The observations of the U.S. Supreme Court in *Riley* make clear that searches of electronic devices provide access to a vast amount of information that extends well beyond the parameters contemplated in a traditional search, and that such searches thus implicate privacy concerns not implicated by a traditional search.

However, even if we may assume that a probation condition such as the one at issue here—i.e., one that permits unlimited searches of a probationer's electronic devices—would be more invasive than an unannounced, without-cause, warrantless search of a probationer's residence, thereby infringing on the probationer's Fourth

Amendment rights to a greater degree than would a traditional search of his home, in some contexts such infringement may be justified. We therefore look at the particularized circumstances of the offense or offenses at issue, as well as the needs of the probationer challenging the condition, in terms of rehabilitation, to assess whether the infringement of the probationer's privacy interest is justified.

After giving due regard to the nature and circumstances of the offense at issue, as well as Bowden's unique needs with respect to his reformation and rehabilitation, we conclude that a condition permitting a probation officer access to search Bowden's electronic devices may be constitutionally imposed in this case despite its invasiveness. Specifically, although Bowden did not utilize an electronic device in committing the offense, unlike situations in which the offense has no conceivable relationship to the use an electronic device, in this case, Bowden's purpose in unlawfully taking the items by use of force was to sell those items for cash to purchase drugs. The selling of stolen items and the purchasing of drugs is often accomplished through the use of electronic devices. In particular, given Bowden's drug use and addiction, permitting a probation officer to monitor Bowden's electronic devices to ensure that he is not using a cell phone or other device to facilitate drug purchases and/or drug use constitutes a legitimate purpose for imposing the condition. Under the facts of this case, the state's interests in reforming and rehabilitating Bowden and in supervising him during his probationary term outweigh even the heighted privacy interest that Bowden may have in his electronic data. We therefore conclude that the electronic search condition is both tailored to, and reasonably

related to, the state's compelling interest in reforming and rehabilitating Bowden. (*See In re E.O.*, *supra*, 188 Cal.App.4th at p. 1153.)

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.